No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1926

JAMES DUIGNAN, APPELLANT

v.

UNITED STATES OF AMERICA AND PALL MALL REALTY CORPORATION

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND PETITION FOR WRIT OF CERTIORARI TO THAT COURT

BRIEF FOR THE UNITED STATES

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1926

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BRIEF FOR THE UNITED STATES

In so far as the decree in this case ordered the padlocking of the premises, the case is moot, as the record indicates that the decree was not superseded and has been executed.

In so far as the decree determined that a nuisance existed and that a permanent injunction should be issued against it, it does not seem to be assailed. The appellant's brief, in specifications of error to be assigned, Nos. 1, 2, 6, and 8 seems to raise the question, but all argument is directed to the question of the cancellation of the lease. The assignments of error on which the case was presented to the Circuit Court of Appeals are not given in the record. All points relating to the decree in so far

as it determined that a nuisance existed and that a permanent injunction should be issued seem to be abandoned in this case. Further, if the point is insisted on that a jury trial should be granted on whether a nuisance existed, the point is so unsubstantial as not to require argument. See *Thomas Murphy et al.* v. *United States*, No. 443, October Term, 1926, decided December 6, 1926.

The only question of any substance remaining for consideration is whether the provision in Section 23 of the National Prohibition Act, providing for forfeiture of leases, is appropriate and valid legislation for the enforcement of the Eighteenth Amendment, and, incidentally, whether a cross bill for cancellation of the lease by the lessee is proper in an abatement suit, and whether trial of that issue must be by jury.

These questions have been ably dealt with in the brief for the Pall Mall Realty Corporation, and it may be taken for granted that there is nothing to add to what the distinguished counsel for that appellee has to say on the subject.

The case for the United States is accordingly submitted on the brief for the Pall Mall Realty Corporation.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

DECEMBER, 1926.

No. [redacted] 101

In the Supreme Court of the United States.

OCTOBER TERM—[redacted] 1925

JAMES DUIGNAN,

Petitioner,

against

UNITED STATES OF AMERICA, PALL MALL REALTY CORPORATION,

Respondents.

Brief on Behalf of Pall Mall Realty Corporation in Opposition to Petitioner's Application for a Writ of Certiorari.

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In the Supreme Court of the United States.

October Term—1924.

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against
United States of America,
Pall Mall Realty Corporation,
Respondents.

Brief on Behalf of Pall Mall Realty Corporation in Opposition to Petitioner's Application for a Writ of Certiorari.

Stripped of all unnecessary verbiage, the petitioner apparently assigns four reasons in support of his contention that this writ should be granted:

(A) That he was entitled to and was wrongfully denied a trial by jury.

(B) That the forfeiture clause of the National Prohibition Act was not intended to be retroactive—it did not affect leases made prior to its adoption.

(C) That petitioner's lease was so valuable to him, its forfeiture for continuous violations of the National Prohibition Act constitutes cruel and unusual punishment, and that portion of the act decreeing forfeiture is, therefore, unconstitutional; and

(D) That there is a conflict in the decisions of the courts as to the question of procedure which merits the consideration of this court.

Statement of Facts.

A brief recital of the established facts will be necessary. The petitioner was the tenant of the *entire* building, 655-657 Eighth Avenue, Manhattan, New York City. The respondent, Pall Mall Realty Corporation, was and is the owner and the landlord of the said premises. The proceedings were brought by the United States Government by the issuance of a citation on the 18th day of October, 1923 (fols. 22-38). Thereafter, upon motion of the United States an order was made dated the 23rd day of October, 1923, making the Pall Mall Realty Corporation an additional party defendant and amending the bill of complaint to include such additional defendant and alleging its ownership of the premises, etc. (fols. 40-43).

The petitioner interposed a general denial to the bill of complaint.

The respondent Pall Mall Realty Corporation interposed an answer consisting of denials (fols. 53-55) and of a separate defense (fols. 56-59) which alleged that it was the landlord of the

premises and Duignon the tenant thereof, that Duignan was in occupation and possession of the premises and in full control thereof and that upon being informed of the violations of the National Prohibition Act upon the premises, it had notified the tenant that it elected to cancel the lease. In addition to the denials and separate defense and by way of cross-bill, the respondent Pall Mall Realty Corporation alleged the lease to Duignan (fols. 60-61), the possession of the premises by Duignan thereunder (fol. 62) the subsequent purchase by it of the premises (fol. 63), upon information and belief the violation of the National Prohibition Act by the petitioner Duignan (fols. 63-64), a decree by the United States District Court for the Southern District of New York, dated January 3, 1923, adjudging the *premises occupied by Duignan to have been a common nuisance upon February 16th, 17th, 18th and 24th, 1922*, and also upon *March 1st and 2nd, 1922* (fols. 64-65), and, upon information and belief, violations of the Prohibition Act by the petitioner Duignan subsequent to such decree (fols. 65-66). The answer prayed for the dismissal of the complaint as to it and for affirmative judgment upon its cross-bill cancelling the lease, pursuant to Section 23 of Title II of the National Prohibition Act (fols. 66-67).

The petitioner was served with a copy of this respondent's cross-bill, but he failed to interpose an answer although he recognized it by moving for an order framing the issues thus raised, in order to aid the conscience of the Court as we shall hereafter show.

The trial was had before Honorable John C. Knox, District Judge for the Southern District

of New York. The Government called six witnesses on its behalf; the petitioner Duignan called eight witnesses; and the respondent Pall Mall Realty Corporation three witnesses. Three witnesses testified that they had bought whiskey in the premises over a period from May 26th to June 8th, 1923 (pp. 43, 54, 95 et seq.). Three vials of liquor purchased upon the premises and subsequently delivered to and examined by the United States Chemist, who pronounced the samples to be whiskey, were placed in evidence (pp. 44, 84, 99). Two witnesses, Federal Prohibition Agents, testified to having searched the premises on March 24, 1922, pursuant to a search warrant and having found *twenty-four two ounce bottles of gin and three half pints of whiskey in a drawer of a dresser in Room 7* and in a closet in the same room *two quart bottles and one five-gallon bottle and about two gallons of whiskey and one pint of gin* (fols. 380 and 411). There was also placed in evidence a decree *pro confesso* entered on the 3rd day of January, 1923, in a suit brought by the United States of America against James Duignan and Claude Capponi, adjudging the premises involved herein to have been a common nuisance on the 15th, 16th, 17th, 18th and 24th of February and the 1st and 7th days of March, 1922, and enjoining the manufacture, sale and storing of intoxicating liquor on the premises (fols. 667-672).

Such facts proved conclusively that intoxicating liquors, as defined by the National Prohibition Act, had been sold continuously in the premises for a period of a year and a half.

In support of the cross-bill of the respondent Pall Mall Realty Corporation, it was shown that

the corporation was the landlord of the premises (fols. 107-108); that the corporation was given notice by the Police Department of the City of New York of the violations of the liquor Law upon the premises (fols. 673-678); that immediately upon receipt of such notice the corporation notified the tenant Duignan of its intention to cancel the lease (fols. 679-681) and that when Duignan refused to quit the premises summary proceedings were instituted in the Municipal Court of the City of New York (fols. 77, 78, 110, 493, 494).

The petitioner Duignan attempted to prove and he now asserts—that the lease of the premises was of great value in support of his plea that he should not be deprived of it, but his expert, when questioned by the court, was forced to admit that the value of the said lease was negligible (fols. 443-445).

The facts proven on the trial showed petitioner to have been a contumacious violator of the National Prohibition Act.

In 1920.

On May 27th, 1920, his bartender was arrested and subsequently convicted on a plea of guilty of having violated the Act, as petitioner swore in his own affidavit (fol. 80) and testified upon examination (fol. 506).

In September, 1920, petitioner himself was "subpoenaed" and forced to put up bail—i. e., arrested (fols. 504-506).

Another bartender, Paul Paponi, also pleaded guilty and went to jail (fols. 507-508).

In 1921.

On May 31, 1921, another of Duignan's men Simon Pigasci, was arrested for violation of the Act and he also pleaded guilty (fol. 80).

On two separate occasions actions were brought against the petitioner for injunctions (fols. 509).

In 1922.

In an equity action against Duignan and Capponi (Tony) the petitioner appeared by Mr. Donnellan but failed to answer and his hotel was found to have been a nuisance on February 15th, 16th, 17th, 18th and 24th, 1922, and on March 1st and 7th, 1922, by reason of illegal sales of liquor having been made on those dates (fols. 370, 371, 667 to 672). Judgment *pro confesso* was taken against him for having violated the Prohibition Act on all of those dates. His default has never been opened and that judgment stands in full force (fol. 371). By that judgment he was enjoined from further sales of liquor in the premises. In spite of this injunction and in spite of all these warnings, repeated insistently, petitioner chose to ignore the law and set himself up as one superior to it. His attitude is shown by the fact that the very bar fixtures that he installed in pre-prohibition days never were removed but the premises presents the same old picture of a corner saloon (fols. 358 and 471).

In 1923.

The evidence of Reager (pp. 43 *et seq.*), O'Connor (pp. 54 *et seq.*), Westing (pp. 95, *et*

seq.). Barry (pp. 126, *et seq.*) and Jackers (pp. 137 *et seq.*) clearly showed that Duignan was continuing his violations even after the injunction of 1922 and until at least June 8th, 1923 (fols. 292, 293).

Petitioner knew the value of his lease; if he now must suffer the consequences of his violations, he has no one but himself to blame.

ARGUMENT.

POINT I.

Answering Petitioner's Points First, Second, Third, Fourth, Sixth and Seventh that he was deprived of his constitutional right to trial by jury.

The petitioner contends that the trial of the cross-bill interposed by this respondent should have been had before a jury at law. But the petitioner submitted to the jurisdiction of equity without raising this question, and accordingly he is now too late to raise the objection, even if it had any merit. Three months before the trial took place, after issue had been joined and action was pending, he *served notice of motion to have the issues framed for a trial by jury.* His affidavit upon that motion clearly showed that what he desired then was solely a jury in equity to advise the conscience of the court. At folio 84 will be found his request in the following language:

> "That this request is made because your deponent believes that a jury of twelve men

can be of assistance in advising the court as to the credibility of the witnesses, who will be numerous upon this trial".

This motion was addressed mainly to the issues raised by the cross-bill, for the moving affidavit treats entirely of such issues.

On the trial counsel for the petitioner cross-examined all of this respondent's witnesses and offered testimony in support of his contention that equity should not decree cancellation of his lease as prayed for in this respondent's cross-bill.

At the close of the entire case the appellant made a motion to dismiss the proceeding as properly triable before a jury (fol. 601) but such motion was fatally defective and appellant had to choose either one of the two dilemmas. If he construed the motion as relating back to his previous motion in January, the situation was not aided for then, like such previous motion, it would deal solely with a jury trial in equity, and as a jury trial in equity is purely a matter of discretion with the trial court, its denial did not constitute error.

Cochrane v. *Deener*, 94 U. S. 780.

If, however, he maintained that his motion was an entirely new one for a jury trial at law, it came too late for it is well settled that such a motion must be made at least before a party has entered upon his case.

Kilbourne v. *Sunderland*, 130 U. S. 505;
First Savings Bank & Trust Co. v. *Greenleaf*, 294 Fed. 467;

Royal Union Mutual Life Insurance Co. v. Lloyd, 254 Fed. 407;
So. Pacific Ry. v. U. S., 133 Fed. 651, 669 (C. C. A. 9th Circuit).

In the case of *Wylie v. Coxe*, 15 How. 415, Justice McLean said, at page 420:

> "The want of jurisdiction if relied upon by the defendant, should have been alleged by plea or answer."

In the case of *Insley v. U. S.*, 150 U. S. 512, Justice Brown said, at page 515:

> "Even an objection that an action should have been brought at law instead of in equity may be waived by failure to take advantage of it at the proper time;"

and Justice Brewer also said in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, at page 381:

> "If there was a defense existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made *in limine*."

Whatever the motions made by petitioner were, they certainly were not motions to transfer the proceeding upon the cross-bill to the law side of the court, and accordingly they will in no case avail him.

On this point Judge Trieber in the case of *Fay v. Hill*, 249 Fed. 415, at page 418, said:

"The fact that the plaintiff had a complete and adequate remedy at law is no longer ground for demurrer or motion to dismiss. *The proper procedure is to move to transfer it to the law side.* Equity Rule 22. *Failure to make such a motion and proceeding to a hearing was a waiver.*" (Italics ours).

As was said by Hough, C. J., in his opinion in this case:

"Exactly what appellant (petitioner here) meant by his motion for a jury trial is not clear from the record. If his thought was to try before a jury the issue of nuisance, the motion had no foundation in law.

The applicable sections of the National Prohibition Law have a long legal history. The legal concept of extending by legislative fiat the definition of a public nuisance to something theretofore legal, and then calling upon equity to abate it, is found in the Kansas Statute of 1885, quoted by Harlan, J. in *Mugler* v. *Kansas*, 123 U. S. 623, at 670; and is there expressed in a form distinctly more violent than are the nuisance sections of the Volstead Act. The thoroughness with which the Supreme Court upheld the Kansas method, has been the sustaining foundation of prohibitory legislation of sundry kinds for forty years, while as for jury trials, we quoted the rule in the Reisenweber case (*United States* v. *Reisenweber*, 288 Fed. 520) at page 523; and it is that when the legis-

lature constitutionally extends the definition of public nuisance to anything, such newborn nuisance, being created for destruction, may be destroyed *without jury intervention.*

If, however, Duignan's motion be thought to be confined to the case raised by the cross-bill, he was not in a position to make the motion for he never answered or otherwise raised an issue with the Realty Co. . . .

If he had answered on the merits and tried the case without denying jurisdiction, he would be concluded under *Southern Pacific Co.* v. *United States*, 133 Fed. 651, and cases cited; and *a fortiori* is he concluded by trying the case fully while in default for want of an answer."

Even if the petitioner had answered and then properly moved for a transfer of the action to the law side of the court and for trial by jury, he would have met defeat if this court is to sustain the decision in the cases of

Grossman v. *U. S. ex rel Brundage*, 280 Fed. 683, and
U. S. v. *Boynton*, 297 Fed. 261.

In the Grossman case an appeal was had to the Circuit Court of Appeals for the 7th Circuit from a decree in an equitable suit to abate a nuisance, pursuant to Title II of the National Prohibition Act, which decree directed the cancellation of the tenant's lease, upon the prayer of the landlord's cross-bill. In that suit, as in this one, the owners of the premises were made

defendants along with the tenant, who, it was charged, was maintaining a nuisance on the leased premises. The complaint therein prayed that the nuisance be abated and that the premises be closed for a period of one year. To the granting of this last sought relief the landlords were opposed. They pleaded their ignorance of the actions and conduct of the tenant and the conditions existing in the leased premises. They set forth all of the facts showing ownership, lease, etc., and prayed that if the tenant was maintaining a nuisance or disobeying any injunctional order of the court, his lease be cancelled. In their prayer for relief they asked "that the lease may be cancelled and declared forfeited as against said Grossman". Such was the identical prayer of the landlord herein. Evans, C. J., at page 685, disposed of the contention that the Court in Equity could not grant such relief to the landlord, as follows:

> "Coming to the allegation of the bill, we find the situation somewhat unusual. The owners were not in possession of the premises. The tenant Grossman was charged by the Government with a violation of the National Prohibition Act and the maintenance of a nuisance. This charge he denied. The owners, professing to be law abiding citizens, desirous of respecting the law, anxious to protect their property, but uncertain as to the facts, answered in the equity suit and asserted that they were innocent of any wrongdoing and that they wished the lease terminated, and prayed for its termination and the ouster of the co-defendant Grossman

These facts, if established, would appeal favorably to a court of equity. The court might not conclude to dispossess the landlord, if it appeared that he was innocent of the uses to which his property was being put by the tenant and manifested a desire to co-operate in abating the nuisance * * *.

His attitude toward the tenant, after being informed of the latter's misconduct, might, and probably would, be determinative of the state of his mind and his knowledge of the tenant's wrongdoing; for it is hardly conceivable that a law-respecting landlord would not avail himself of the above-quoted provision of the National Prohibition Act and seek to oust the tenant upon discovering that his premises were being maintained as a nuisance by such tenant. On the other hand, the landlord who repudiates the tenant's action immediately upon learning of the facts, and who at the first opportunity avails himself of a remedy open to him to oust the tenant from the premises, necessarily places himself in a position of vantage when it comes to the terms of the decree finally entered.

We have, then under consideration a cross-bill where the subject matter is germane to that of the original bill. The relief sought was expressly provided for by the statute * * *.

We conclude that the allegations in the cross-complaint were sufficient to support the decree; that it constituted an election to terminate the lease because of the tenant's

violations of the law; that it was a relief which the court was permitted to grant in a suit of this character."

On appeal the petitioner attempted to avoid the determination in the Grossman case by stating that therein an answer to the cross-bill was made, while herein there was no such answer. But that is a distinction without a difference for as stated in the Grossman case "the defendant was not deceived by the pleadings". In the instant case the cross-bill was served personally upon him and while he interposed no formal answer to it, he was permitted upon the trial to and he did introduce evidence in an endeavor to defeat the cross-bill (folios 430 to 445 and 454 to 470). He also cross examined all the landlord's witnesses, and three months before the trial he served notice upon the landlord of a motion for a jury trial in *equity* (folios 70, 72). The petitioner's affidavit upon this motion recognized the issues raised by the landlord's cross-bill. It stressed (fols. 76-77) the value of his leasehold—which of course would have no bearing if it were not for the prayer of the landlord-made much of the landlord's defeated attempts to obtain a trial in the Municipal Court of the City of New York of a dispossess proceeding (fols. 77-78) and stated specifically what relief the landlord sought in his cross-bill (fol. 82) thereby nullifying any possible plea of surprise or ignorance.

The Boynton case (District Court, E. D. Michigan) dealt at great length with contentions identical with those raised by this petitioner

and the entire opinion therein is illuminating upon all such contentions. That was a landlord's motion for permission to intervene by cross-bill in an equity suit brought to abate a nuisance under the National Prohibition Act and seeking affirmative relief cancelling the lease to the other defendant. The only difference between that case and this case is that therein the landlord petitioned to become a party, while herein the landlord had no choice in the matter, but was brought in by the United States Government (fols. 40-48). The same contentions were raised therein as those raised in the court below, but District Judge Tuttle, at page 269, held:

> "They (the landlord) have the right unless and until it be waived, to terminate any such lease held by such a lessee and to have such right enforced by cross-complaint in this suit."

District Judge Tuttle in his opinion further stated, page 268:

> "Is it proper practice for the interveners to file a cross-complaint for affirmative relief against other defendants? As already noted, the National Prohibition Act, in Section 23 of title 2 provides that:
>
> > 'Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease'.

It is also there provided that an action to enjoin a nuisance under the statute 'shall be brought and tried as an action in equity.' It is settled equity practice to permit a defendant in a suit to seek relief against another defendant in such suit with respect to a matter germane to the subject thereof. The practice is recognized in general equity rule 30, providing that:

> 'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit.'

In the present case the very facts relied on by the plaintiff in support of the decree sought by it might also entitle the intervenors to the relief prayed by them. The situation renders the right to set up the cross-complaint in question peculiarly applicable and appropriate. (*Grossman v. United States*, 280 Fed. 683 (C. C. A. 7).

Such practice enables the government and the innocent lessor of premises used as a nuisance under the National Prohibition Act to co-operate to the advantage of both. In the one suit, the existence of the nuisance (if any) may be proved, the good faith of the lessor established, the nuisance which offends both the government and such lessor abated (by the closing of the premises for a sufficient period to accomplish that result), the lease which has enabled the tenant to commit such nuisance may be terminated, such tenant removed, and the

premises restored to the possession and control of such lessor, subject to his giving the bond prescribed by the National Prohibition Act."

Judge Knox recognized that the Grossman case was controlling, for in his opinion in this case he stated, at folios 628-630:

> "As for the propriety of awarding the landlord affirmative relief, I think it, too, should be granted. See *Grossman* v. *United States*, *supra*. The statute is without ambiguity with respect to a lessor's right to declare the forfeiture of a lease of premises wherein a tenant commits a nuisance, as defined by the Section 21 of the Act. The provision is as follows:
>
> > 'Any violation of this title upon any leased premises by the lessee or occupant shall, at the option of the lessor, work a forfeiture of the lease.'
>
> Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rights. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture.
>
> Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless, he

chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease. The evidence plainly showed that he took his chances with an enforcement of the law, and the assertion by his landlord of its statutory rights; he did so deliberately and the lease which he now prizes so highly, and which, to be preserved, required only an observance of the law must, now pass from him."

POINT II.

Answering Petitioner's Points Ninth and Tenth that Section 23 of Title II of the National Prohibition Act was not retroactive—it did not affect leases made prior to the passage of the Act.

This contention is raised for the first time in this court. It was not raised on the trial nor was it presented to the Circuit Court on Appeal.

The errors presented to the Circuit Court for review were:

(1) Finding the existence of a nuisance.

(2) Sustaining the cause of action set out in the cross-bill, and.

(3) Denying a trial by jury.

But even though it had been raised in the courts below, it is without merit. The peti-

tioner and his attorneys have evidently overlooked the provisions of the lease between the parties, paragraph Twenty-three reading as follows:

> "Twenty third: The *Tenant* hereby covenants and agrees to comply in all respects *with the provisions of all future and present laws* relating to the traffic in or sale of liquors and the taxation and regulation of the same, or the regulation of the use and occupation of the demised premises, and to promptly execute and comply with any and all rules, orders and regulations of the State Commissioner of Excise, and of any and all other officers, bureaus and departments of the Borough of Manhattan and the City, County and State of New York with respect to any of the foregoing matters. * * * (fol. 662)"

It can hardly be argued seriously that it was the intent of Congress that only leases made after the passage of the Act should be affected by the so-called forfeiture clause of the Act. If such was the intent the Act would be without the teeth necessary for its enforcement. The statute is plain and without ambiguity with respect to a landlord's right to declare a forfeiture when the tenant maintains a nuisance upon the demised premises. Section 23 of the Act provides that:

> "Any violation of this title *upon any leased premises* by the lessee or occupant shall, at the option of the lessor, work a forfeiture of the lease."

As Judge Knox said in his opinion rendered on the decision in this case in the District Court (fol. 629):

> "Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rights. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture."

The cancellation was clearly justifiable as one means of abating the nuisance and also as incidental relief afforded the landlord under the doctrine that "*equity delights to do justice and not by halves*" and that "*equity will grant complete relief between the parties.*"

In *Camp* v. *Boyd*, 229 U. S. 530, at page 552 Justice Pitney said:

> "One of the duties of such a court (equity) is to prevent a multiplicity of suits and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes *even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority. Oelrichs* v. *Spain*, 15 Wall. 211, 228; *Holland* v. *Challen*, 110 U. S. 15, *Reynes* v. *Dumont* 130 U. S. 354, 393, *Kilbourne* v. *Sunderland*, 130 U. S. 505."

A portion of Mr. Justice Harlan's opinion in *U. S.* v. *Union Pacific Ry. Co.* 160 U. S. 1, deals with the general principles involved herein; at page 50, he said:

> "It cannot be doubted that the Government could lawfully proceed by mandamus against the railway company for the purpose simply of compelling it to perform any duty imposed by its charter or by statute. But that remedy would not afford the United States the full relief to which it is entitled. Here are agreements between the railway company and the telegraph company that are wholly inconsistent with the present claims of the Government. Until cancelled because inconsistent with the Act of 1888, and prejudicial to the rights of the Government and the public by a decree to which the telegraph company is a party, those agreements constitute an obstacle in the way of the enforcement of that Act, and the protection of those rights. In a mandamus proceeding by the Government against the railway company, the telegraph Company could not properly be made a defendant, and no judgment in mandamus as between the United States and the railway company, would conclude the rights of the telegraph company. The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the act of 1862 and the acts amendatory thereof as well as with the act of 1888. Jurisdiction in equity be-

ing acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company and the telegraph company which relate to the general subject of telegraphic communication between the points named by Congress. Consequently a decree cancelling the agreements of 1866, 1869, 1871 and 1881, by reason of their being in the way of the full performance by the railway company of the duties imposed by the act of 1888 may also require the railway company to obey the directions of Congress as given in the last named Act."

and at page 51:

"* * * In *Boyce* v. *Grundy*, 3 Pet. 210, 215, this Court said: 'It is not enough that there is a remedy at law. It must be plain and adequate or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' The circumstances of each case must determine the application of the rule. *Watson* v. *Sutherland*, 5 Wall. 74, 79. In *Oelrichs* v. *Spain*, 15 Wall. 211, 228 an objection was raised that the remedy at law was ample. The court, observing that the remedy at law was not as effectual as in equity, said, among other things, that a 'direct proceeding in equity will save time, expense, and a multiplicity of suits and settle finally the rights of all concerned in one litigation'. The final

order in a proceeding by mandamus against the railway company would not conclude the rights of the telegraph company. Nor would a suit in equity by the telegraph company against the railway company conclude the rights of the United States. But a suit in equity by the United States against both companies for the purpose of annulling the agreements under which the telegraph company claims rights adverse to the United States, can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters. *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 567."

In *Gormley v. Clark*, 134 U. S. 338, Chief Justice Fuller, at page 347, dealt with the question as follows:

"The subject received much consideration from Judge Blodgett, holding the Circuit Court for the Northern District of Illinois, in *Smith v. Gage*, 11 Bissell. 217, 220, in which he announced substantially the same conclusions. And he remarks 'that the court on the final hearing of such a case, may, in its discretion, as a court of equity, where two conflicting titles are presented, the validity of which can be determined in a court of law by the express terms of its decree, remit the parties holding such titles to a court of law for the trial of their rights, but this would be purely a matter of equitable discretion, *and does not limit the power*

> *of the court in this proceeding to settle the entire title by its decree'. In Gage* v. *Carabee, ubi supra,* the Supreme Court of Illinois says: 'Whatever may be the power of the court of chancery, where there are controverted titles, to restore by its decree the evidence of title in the respective parties as they were before the destruction of the record, and then, in its discretion, remit the parties to a court of law, to there try their titles, it is manifest no such course was contemplated by the statute or necessary in cases under it'. p. 452." (Italic ours.)

and Chief Justice Fuller in the same case on the question of the power of a court of equity to grant full relief, at page 349, among other things, said:

> "It is strenuously insisted that the remedy of law was adequate, and that as the right of possession was purely a legal question and for a jury, the Court of Chancery should have declined jurisdiction; but, inasmuch as the case came within the provisions of the statute, *and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction.* The jurisdiction in equity attaches unless the legal remedy both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. *Kilbourn* v. *Sunderland,* 130 U. S. 503, 514."

It is no answer to say that the relief herein granted the landlord was tantamount to ejectment, for such relief has been granted in equity as incidental from time immemorial. *Chanslor-Canfield Midway Oil Co.* v. *United States* 266 Fed. 145 and *Gormley* v. *Clark*, (*supra*) are two such cases. A number of English cases on the subject are:

Dormer v. *Fortescue* (1744) 3 Atkyns, 123;
Owen v. *Griffeth* (1749) 1 Vesey, 249;
Wrixon v. *Colter*, 1 Ridgeway, 295;
Chetham v. *Hoare*, 22 Law Times Report, N. S. 57.

The case of *Dormer* v. *Fortescue, supra,* was to compel delivery of a deed and Lord Chief Justice Hardwicke therein at page 132 said:

> "If the trustees had been made parties to it the court might have decreed possession and a conveyance of the trust estate if they thought it a clearpoint for the plaintiff."

Owen v. *Griffith* (supra) was a bill to have an account taken and for relief and satisfaction in the nature of a redemption of an estate upon an elegit and defendant was decreed to deliver up a possession after the Master had reported back as to the amount of rents.

It is hard to conceive of any relief being more germane and incidental than that of the cancellation of Duignan's lease. The very facts which would prove the Government's case were sufficient to prove the landlord's in so far as

the tenant was concerened. To compel the landlord to resort to a seperate trial at law would be idle and useless practice and merely lead to a multiplicity of suits for the fact of the violations would be *res adjudicata* between the landlord and the tenant and there would be no question of fact for a jury to determine.

This was clearly seen by the learened Judge in the Boynton case (supra) and again we quote his words (page 268)

> "In the one suit, the existence of the nuisance, if any, maybe proved, the good faith of the lessor established, the nuisance which offends both the Government and such lessor abated (by the closing of the premises for a sufficient period to accomplish that result), the lease which has enabled the tenant, to commit such nuisance may be terminated, such tenant removed, and the premises restored to the possession and control of such lessor, subject to his giving the bond prescribed by the National Prohibition Act."

It was altogether fitting and proper that Congress should provide that Equity have power to cancel leases existing at the time of the passage of the Act because under the Act violations of it by a tenant might compel an innocent landlord to suffer. It is provided in the Act that the property used in the manufacture and sale of intoxicating liquor, including the building in which it is sold, may be seized and sold by the Federal authorities. Nothing that a landlord might do could prevent such confiscation of his property were it not for

this provision of the act permitting cancellation of the lease. No relief could be had at law to prevent such a loss of the innocent landlord's property, and accordingly the act provides for such protection by granting the power to cancel the lease.

The landlord could bring no action at law in ejectment as the tenant held under a subsisting lease. The relationship of landlord and tenant continued to exist until the cancellation of the lease by the court. This relationship was a recognition by the defendant Duignan of the title in the Pall Mall Realty Corporation. As there was no dispute of title until the cancellation, the landlord could bring no action in ejectment until the lease was cancelled for it is essential to an ejectment action that there be a dispute of title. The only course left open to the landlord was to have the lease decreed cancelled; and as a court of law has no such power, he was forced to resort to equity for his relief.

POINT III.

Answering Petitioner's Point Eleven and the statement contained in his petition that the lease in question was of the value of $250,000 and its forfeiture for continuous violation of the Act constituted cruel and inhuman treatment which renders that portion of the Act unconstitutional.

Petitioner at page 2 of his petition and again under his Eleventh point attempts to

create the impression that the "uncontradicted evidence" showed that the "unexpired term" of his lease was of the reasonable market value of $250,000 and that before going into posession he had expended $62,500 in fitting the premises for occupancy.

As to the value of the lease.

That this lease was of any value is doubtful. The building was an old four-story brick one with 53 rooms, three baths and six showers (fol. 443). Rooms rented for eigth and nine dollars a week and twelve dollars if occupied by two persons. Transient roomers paid $1.50 per day (fols. 524-528); meals were thirty to forty cents (fol. 530). A hotel? No, merely a lodging house. Even petitioner's real estate expert who tried his best to make the lease appear to be a valuable one was forced to admit that it had no value. He testified in answer to questions put to him by the court (fol. 444):

> "I do not suppose that there would be any rental value as of today."

and again (fol. 445):

> "I do not know as it would have any rental value at all. I do not know who would go in there."

The petitioner should gain no sympathy through his claim that the value of his cancelled lease was great. In the first place the testimony showed that his lease was far from

valuable. It is well known that motor boats and other boats of a value many times that of this lease have been seized by the Government and sold. The Biltmore Hotel had a valuable bar, so did the Manhattan, the Knickerbocker and the Astor; and there were very many profitable saloons of large proportion in the City of New York and very valuable saloon leases in existence before prohibition. All these hotels and saloons were forced to close their bars, and did so. Why should this petitioner be given special consideration? He must have known of the value of his lease before he flouted the law, but as heretofore shown, he flaunted his disregard for the Act for four years, and we do not believe that he is now in a position where he should be heard to whimper because of possible disaster that he brought down about his head.

As to petitioner's investment of $62,500.

At page 6 of the petition the statement is made that $62,500 was expended by the petitioner in fitting up the premises for his use, he evidently having forgotten his testimony on the trial at fol. 455 of the record that such sum was expended not only in remodeling but in the purchase of "*the furniture, linen and everything in the place.*"

Judge Knox before whom this case was tried in the District Court was not unaware of petitioner's claim that this lease was a valuable one and that he had expended money in order to fit it for use as a cafe, and on that very point at fol. 629 in his opinion said:

"Congress doubtless assumed that many leases would have substantial value, and for that reason probably believed that such fact would tend to deter lessees from violating the law and thus jeopardizing their property rigths. It was reasonably to be supposed that the more valuable the lease, the greater would be the disposition of the lessee to see that it was not subjected to forfeiture.

Duignan was chargeable with knowledge of the consequences that might arise from his disregard of the law. Nevertheless, he chose to conduct his business in almost open defiance of both the statute and his lease, and it is with poor grace that he now seeks to avert the impending loss of his lease. The evidence plainly shows that he took his chances with an enforcement of the law, and the assertion by his landlord of its statutory rights; he did so deliberately and the lease which he now prizes so highly, and which, to be preserved, required only an observance of the law, must now pass from him."

POINT IV.

Answering petitioner's contention that there is a conflict in the decisions of the courts on the question of procedure under Section 23 of Title II of the Prohibition Act.

The petitioner contends at pages 9, 10 and 11 of his petition that there is a conflict in the

decisions of the courts on the question of the procedure to be adopted in administering the provisions of the Act in question, but he fails to note the all important distinction that there is no *conflict between courts of concurrent jurisdiction*. The cases cited by him show that there is no conflict between Circuit Courts of Appeal but only between the Circuit and one District Court.

The case of *Grossman* v. *United States* ex rel Brundage, 280 Fed. 683 was passed upon by the Circuit Court of Appeals, 7th Circuit and until that decision is reversed, it stands as the Country's law upon the subject. The case of *United States* v. *Boynton, et al.*, 297 Fed. 261 was decided by the District Court for the Eastern District of Michigan and the decision there is in harmony with the Circuit Court's decision in the Grossman case.

The case of *United States* v. *Lot*, 29 etc., City of Omaha, 296 Fed. 729 was a Federal Court case (District of Nebraska) and the opinion of Judge Woodrough in that case was *dicta* only. There was no question before the court in that case between landlord and tenant under Section 23 of Title II of the Prohibition Act, nor was any proof offered of *continued violations* and maintenance of a nuisance.

Judge Knox had in mind the decision of Judge Woodrough in the last cited case when writing his opinion in this case. Referring to the decision of Judge Woodrough he said:

> "Furthermore, attention was called to the decision of Judge Woodrough, of the Dis-

trict of Nebraska in the case of *United States* v. *Maier*, filed March 7, 1924, wherein he held the provisions of the Prohibition Law under which this suit was brought, to be unconstitutional, and I was desirous of learning his reasons for such conclusion. The opinion is now before me, and has been considered.

The facts before Judge Woodrough were quite different from those here presented. In his case, the nuisance had ceased to exist. In this suit, the nuisance, I am ready to believe, continued down to the date upon which the bill was filed. Indeed, I have no doubt it continued to the date of trial. If under such circumstances, the decision has any present applicability, I must dissent therewith. But whatever may be the necessary inferences to be drawn from the language employed by the Court in the Maier case, its holding to the effect that Section 22 of the National Prohibition law is unconstitutional and void, cannot be followed. The point is no longer arguable in this circuit. See *United States* v. *Reisenweber*, decided by the Circuit Court of Appeals upon January 18, 1923, where it was said:

> "It is equally free from doubt that Congress has the constitutional power to authorize that an action to enjoin the nuisance can be brought in any court having jurisdiction to hear and determine equity cases as provided in Section 22." (fols. 625, 626).

It must be apparent to this court that there is no conflict in the decisions of Courts of concurrent jurisdiction on the question involved.

POINT V.

The petition for a writ of certiorari should be denied.

Dated, New York City, May 20th, 1925.

Respectfully submitted,

LESLIE & ALDEN,
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Pall Mall Realty Corporation.

JOHN W. DAVIS,
Of counsel.